

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Inventor(s): Guo et al.
Patent No: 7,459,314 (Appl. No. 10/775,274, filed 02/10/2004)
Issued: 12/02/2008
For: LATERAL FLOW IMMUNOASSAY CONTROLS
Examiner: Bao Thuy L. Nguyen
Art Unit: 1641

Mail Stop Patent Ext.
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Request for Reconsideration of Patent Term Adjustment
under 37 C.F.R. § 1.705(d)

SIR:

It is hereby respectfully requested that the Office reconsider the Patent Term Adjustment determined in the above-referenced U.S. Patent No. 7,459,314 and revise the Patent Term Adjustment to **739 days**, which is believed to be the correct Patent Term Adjustment.

The bases for the revised Patent Term Adjustment are *Wyeth v. Dudas*, No. 07-1492 (D.D.C. Sept. 30, 2008), and the relevant dates, below, showing examination delay under 37 C.F.R. §§ 1.702(a) and 1.702(b) and the period of adjustment under 37 C.F.R. § 1.703.

	<u>Relevant Dates</u>	<u>Period of Adjustment</u>
Examination Delay under 37 C.F.R. § 1.702(a)	<p><i>37 C.F.R. § 1.703(a)(1)</i></p> <ul style="list-style-type: none"> • Filing date of the application: <u>02/10/2004</u> • 14 months after the filing date of the application: <u>04/10/2005</u> • First action mailed: <u>10/05/2006</u> 	Difference for which patentee should receive credit: <u>+ 543 days</u>
	<ul style="list-style-type: none"> • Reply under 37 C.F.R. § 1.111 filed: <u>02/28/2008</u> • 4 months after the filing of the Reply under 37 C.F.R. § 1.111: <u>06/28/2008</u> • Action under 35 U.S.C. § 132 or Notice of Allowance mailed: <u>07/22/2008</u> 	Difference for which patentee should receive credit: <u>+ 24 days</u>
Examination Delay under 37 C.F.R. § 1.702(b)	<ul style="list-style-type: none"> • Filing date of the application: <u>02/10/2004</u> • Three years from filing date of the application: <u>02/10/2007</u> • Filing date of Request for Continued Examination: <u>09/27/2007</u> • Issue date of patent: <u>12/02/2008</u> 	Difference for which patentee should receive credit: <u>+ 229 days</u>
Circumstances under 37 C.F.R. § 1.704	<p><i>37 C.F.R. § 1.704(b)</i></p> <ul style="list-style-type: none"> • Date Office Action or Notice mailed: <u>12/08/2006</u> • 3 months from date Office Action or Notice mailed: <u>03/08/2007</u> • Response filed: <u>04/06/2007</u> 	Difference for which § 1.702 period of adjustment should be reduced: <u>- 29 days</u>
	<ul style="list-style-type: none"> • Amendment under 37 C.F.R. § 1.312 or other paper filed after the mailing of a Notice of Allowance: <u>09/24/2008</u> • Date Office acted on Amendment under 37 C.F.R. § 1.312 or other paper filed after the mailing of a Notice of Allowance: <u>10/21/2008</u> 	Difference for which § 1.702 period of adjustment should be reduced: <u>- 28 days</u>
Total		<u>739 days</u>

Pursuant to the recent decision by the U.S. District Court for the District of Columbia in *Wyeth*, a patentee is entitled to Patent Term Adjustment credit for examination delay under 37 C.F.R. § 1.702(b) in addition to any examination delay under 37 C.F.R. § 1.702(a), to the extent that the two periods of delay “do not occur on the same calendar day or days.” A copy of *Wyeth* is attached hereto as “Attachment A” for the Office’s convenience.

Thus, it is believed that the present patentee is entitled to credit for the sum of 567 days under 37 C.F.R. § 1.702(a) and 229 days under 37 C.F.R. § 1.702(b), for a total of 796 days, subject to a reduction of 57 days under 37 C.F.R. § 1.704, for a ***total Patent Term Adjustment of 739 days***. The delay periods under 37 C.F.R. § 1.702(a) and 37 C.F.R. § 1.702(b) do not occur on the same calendar day or days under *Wyeth* because the delays under 37 C.F.R. § 1.702(a) occurred between 04/10/2005 and 10/05/2006 and between 06/28/2008 and 07/22/2008, while the delay under 37 C.F.R. § 1.702(b) occurred between 02/10/2007 and 09/27/2007. Accordingly, the delays under 37 C.F.R. §§ 1.702(a) and (b) do not overlap and should be ***credited in total***, less the reduction under 37 C.F.R. § 1.704 as described above.

The above referenced patent is not subject to a terminal disclaimer.

This Request is timely filed under § 1.705(d) because it is being filed within two months of the date the above-referenced patent issued, December 2, 2008, and it does not raise an issue that was raised or could have been raised in an Application for Patent Term Adjustment under 37 C.F.R. § 1.705(b).

Please revise the Patent Term Adjustment as set forth above and charge the fee required by 37 C.F.R. § 1.18(e) estimated to be in the amount of **\$200.00** to Wilson, Sonsini, Goodrich & Rosati Deposit Account No. 23-2415 (Docket No. 32209-733.201).

If the Office deems the Patent Rules to be inapplicable to the present Request, however, then in view of the extraordinary situation presented by *Wyeth* it is respectfully requested that the Office (a) consider suspending or waiving the Rules *sua sponte* presented by *Wyeth* and grant the Request for Reconsideration of Patent Term Adjustment set forth herein or (b) treat the Request for Reconsideration of Patent Term

Adjustment instead as a Petition under 37 C.F.R. § 1.183, charge the accompanying petition fee under 37 C.F.R. § 1.17(f) estimated to be in the amount of **\$400.00** to Wilson, Sonsini, Goodrich & Rosati Deposit Account No. 23-2415 (Docket No. 32209-733.201) and grant the Request for Reconsideration of Patent Term Adjustment set forth herein.

Respectfully submitted,

Dated: 1/14/09

By: 

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